STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

April 29, 1975

Opinion No. 75- 194

Mr. Charles V. Hamm, General Counsel
Legal Division
Social and Rehabilitation Division
State Office Building
Topeka, Kansas 66612

Dear Mr. Hamm:

You inquire concerning K.S.A. 59-2931, and in particular, as it applies to requests by the Kansas Bureau of Investigation, Federal Bureau of Investigation, police and sheriffs' departments, and other law enforcement agencies to inspect or copy medical and hospital records of present or past patients of the Larned State Hospital. You have further requested a definition of "concerned State agency" as the term is used in K.S.A. 59-2931(2)(B).

Relative to law enforcement agencies, this statute provides in pertinent part:

> "The probate court, hospital or medical records of any "patient" or former "patient" that are in the possession of any probate court, "psychiatric hospital," "general hospital" or "other facility for 'care of treatment'" shall be privileged and shall not be disclosed except as
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> (1) otherwise provided in this act; or
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> (2) under any of the following conditions:
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> * * *
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> (C) Upon the order of any court of record after a determination by the court issuing the order that such records are necessary for the conduct of proceedings before it and are otherwise admissible in evidence."

A salutary purpose of this statute is to protect patients and former patients from the adverse social and personal consequences of public disclosure of their hospital and medical records. Towards this end, the legislature has mandated that such records are to be privileged and disclosed only in accordance with the provisions specified in K.S.A. 59-2931.

Under subsection (2) (C), before the probate, medical, or hospital records of any patient or former patient may be released, two conditions must be met: there must first be a determination by the court issuing the order that such records are necessary for the conduct of proceedings before it, and these records must otherwise be admissible into evidence. Absence of either condition prohibits disclosure.

In common legal parlance, "proceedings" before a court require the commencement of either a civil or criminal action over which the particular court has proper personal and subject matter jurisdiction. In the instance of civil matters, a proceeding begins with the filing of a petition. K.S.A. 60-203. In criminal matters, the commencement of a prosecution begins with the filing of a complaint with the magistrate. K.S.A. 22-2301. Mere investigations by law enforcement agencies preliminary to an action are not "proceedings" before a court and are not legitimized as such by the investigating agency obtaining a court order to the effect that the probate medical, or hospital records are necessary to conduct a particular investigation.

When disclosure is sought of patient records upon the order of a court of record which recites a determination that the records are "necessary for the conduct of proceedings before it," the court must also determine that the records are "otherwise admissible in evidence." Where disclosure is sought merely in the course of an investigation, and there is no adversary proceeding pending before a court in which questions of evidentiary admissibility may be heard and determined, the requirements of the statute are not met.

If production and disclosure is sought in a pending proceeding by other than the patient or his representative, the court has some basis to determine admissibility only after the patient, in whom the statute vests a qualified privilege as to these records, or his representative has an opportunity to be heard on the question of admissibility. Admissibility is rarely determined or determinable in vacuo. Admissibility often turns on questions of relevance, competence, materiality and the like, and unless the questions of admissibility are ruled upon by the court in an adversary proceeding, there has been no determination of admissibility which is binding upon the parties to the proceeding and thus binding upon the custodian of the records.

Subsection (2)(B) authorizes disclosure

> "Upon the sole consent of the 'head of the hospital' or the head of the 'other facility for "care or treatment"' who has the records after a statement, in writing, by such head that such disclosure is necessary for the 'care or treatment' of the 'patient' or 'former patient.' However, such head may make such disclosure to the 'patient' or former 'patient', his next of kin, any concerned state agency, state or national accreditation agency, or scholarly investigator without making such determination."
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> [Emphasis supplied.]

Although the purpose of the entire section purports to be to prescribe restrictive conditions under which disclosure of medical and hospital patient records may be made, the last sentence of the above-quoted paragraph appears to vest virtually unlimited discretion in the head of the hospital or other facility concerning disclosure to the patient or his next of kin, state or national accreditation agencies, scholarly investigators, or "any concerned state agency." One is moved to inquire with what the state agency is supposed to be concerned, to be eligible for disclosure under this provision. The statute gives little guidance.

Reasonably construed in light of the little guidance furnished by the language of this paragraph, this language must be deemed to authorize disclosure of records to any state agency which, in the conduct of its official business and affairs, is concerned or interested in the care and treatment afforded the patient. Once such a showing is made, it rests within the discretion of the head of the facility to determine whether disclosure shall be made.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS/HTW/ksn